Supreme Court, U.S.
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Nos. 80-1640 and 80-1656

In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES NUCLEAR REGULATORY COMMISSION AND THE UNITED STATES OF AMERICA, PETITIONERS

v.

STEVEN SHOLLY, ET AL.

METROPOLITAN EDISON COMPANY, ET AL., PETITIONERS

v.

PEOPLE AGAINST NUCLEAR ENERGY, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL PETITIONERS SUGGESTING MOOTNESS

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TABLE OF AUTHORITIES

Page

Cases:

DeFunis v. *Odegaard*, 416 U.S. 312 5

Great Western Sugar Co. v. *Nelson*, 442 U.S. 92 6

Southern Pacific Terminal Co. v. *ICC*, 219 U.S. 498 6

United States v. *Munsingwear, Inc.*, 340 U.S. 36 6

Statutes:

Atomic Energy Act of 1954, 42 U.S.C. (& Supp. IV) 2011 *et seq.* :

Section 189(a), 42 U.S.C. 2239(a) 1, 2, 3, 5

Pub. L. No. 97-415, 96 Stat. 2067 ..... 4, 5, 6, 1a

Section 12(a) 4

Miscellaneous:

128 Cong. Rec. (daily ed. Dec. 2, 1982):

p. H8809 5

p. H8817 5

p. H8826 5

128 Cong. Rec. S15314 (daily ed. Dec. 16, 1982) 5

H.R. Rep. No. 97-884, 97th Cong., 2d Sess. (1982) 5

H.R. 2330, 97th Cong., 2d Sess. (1982) 5

Section 12 5

Section 23 5

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The issue in this case is whether Section Atomic Energy Act of 1954, 42 U.S.C. 2239 the Nuclear Regulatory Commission to am ing license for a nuclear power plant without hearing, if one has been requested, where th determines that the amendment presents hazards consideration." Because the decision appeals holding that the Commission lacks

has been overruled by recently enacted legislation this case is moot.

1. This case arose on petitions for review of orders of the Nuclear Regulatory Commission issued June 12, 1980, authorizing venting of pent-up Krypton-85 gas from the reactor containment building of the disabled Three Mile Island Unit 2 nuclear power plant, and temporarily amending the operating license for the plant so as to permit that release to be carried out expeditiously. Those orders authorized commencement of venting ten days after their issuance. No public hearing was held in advance of the effective date of the orders because the Commission determined that the operating license amendment entailed "no significant hazards consideration."

Based upon that determination the Commission concluded that the penultimate sentence of Section 189(a) of the Atomic Energy Act of 1954, 42 U.S.C. 2239(a), authorized it to make the operating license amendment immediately effective, notwithstanding any request for a hearing. Accordingly, while the Commission provided that any interested person affected by the license amendment could request a hearing within thirty days of its order, it made the order effective immediately and provided that "[a] request for a hearing will not stay the effectiveness of this Order" (80-1640 Pet. App. 66a).

On June 23, 1980, Respondents Sholly and Hossler filed a petition for review of the two June 12 orders in the court of appeals, contending, inter alia, that the language of Section 189(a) relied upon by the Commission did not in fact grant authority to dispense with a requested hearing. The court of appeals denied an application for an injunction to forestall the scheduled venting on June 26, 1980, and venting was actually carried out between June 28, and July 11, 1980.

Notwithstanding the completion of venting and the expiration of the temporary amendment to the operating license for the Three Mile Island Unit 2 power plant, proceedings continued in the court of appeals.[1] Because the venting had been completed and the orders of the Commission under review had expired, the Commission, the United States and the utility intervenors argued that the case was moot. The court of appeals, however, disagreed, concluding that the question presented was "capable of repetition, yet evading review" (80-1640 Pet. App. 9a), and accordingly that the case was not moot (*id.* at 8a-13a, 27a). On the merits, the court of appeals ruled that "under section 189(a) the NRC is required to hold a hearing on license amendments whenever interested parties request one" (*id.* at 27a), and that such a hearing must be held prior to issuance of any amendment (*id.* at 22a). The court reasoned that the final sentence of Section 189(a), which the Commission had identified as the source of its authority to dispense with a hearing in advance of making effective a license amendment that entails "no significant hazards consideration," authorized the Commission to dispense with notice and publication respecting such an amendment, but did not authorize omission or deferral of a hearing that had been requested (80-1640 Pet. App. 13a-22a).

The judgment of the court of appeals was entered on November 19, 1980, and petitions for rehearing were denied on March 4, 1981. The petition for a writ of certiorari in No. 80-1640 was filed on March 30, 1981, and the petition in

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[1] A separate petition for review of the Commission's orders had been filed in the United States Court of Appeals for the Third Circuit by respondent People Against Nuclear Energy on July 8, 1980. That petition was transferred to the D.C. Circuit and consolidated with the petition filed there by respondents Sholly and Hossler. The holders of the license to operate the Three Mile Island Unit 2 nuclear power plant, Metropolitan Edison Company, et al., petitioners in this Court, intervened as respondents in the court of appeals.

No. 80-1656 was filed on April 2, 1981. The petitions were granted and the cases consolidated on May 26, 1981. 451 U.S. 1016.

2. After this case had been briefed, the pendency of legislative proposals that would moot this case by granting or reaffirming the authority held to be lacking by the court of appeals came to the attention of the parties. Accordingly, on November 16, 1981, the Court granted the petitioners' joint motion to defer the oral argument that had been scheduled for the week of December 7, 1981. 454 U.S. 1050. Subsequently, in view of further progress in the legislative process, respondents moved to again postpone oral argument, which had been rescheduled for October 6, 1982, explaining that the "proposed legislation, if enacted might well * * * moot this appeal" (Respondent's Motion to Postpone Oral Argument at 2). Petitioners did not oppose that motion. On September 9, 1982, the Court granted the motion for further deferral of oral argument.

3. On January 4, 1983, the President signed into law Public Law No. 97-415, 96 Stat. 2067. Pertinent portions of that Act are reproduced as an appendix to this memorandum. Section 12(a) of Pub. L. No. 97-415 redesignates the pre-existing text of Section 189(a) as Section 189(a)(1), and adds, inter alia, the following new language to form a part of Section 189(a)(2)(A):

> The Commission may issue and make immediately effective any amendment to an operating license, upon a determination by the Commission that such amendment involves no significant hazards consideration, notwithstanding the pendency before the Commission of a request for a hearing from any person. Such amendment may be issued and made immediately effective in advance of the holding and completion of any required hearing.

Provisions of the new Section 189(a)(2) that follow the above-quoted language prescribe the procedures to be employed by the Commission in exercising this authority. See App., *infra*, 2a. The Conference Report accompanying the bill enacted into law (H.R. Rep. No. 97-884, 97th Cong., 2d Sess. (1982), accompanying H.R. 2330, 97th Cong., 2d Sess. (1982)) describes the pertinent language as "The 'Sholly' Provision" (H.R. Rep. No. 97-884, *supra*, at 36), and affirms (*id.* at 37) that under the bill:

> [T]he NRC may issue and make immediately effective a no significant hazards consideration amendment to a facility operating license before holding a hearing upon request of an interested party.[2]

4. This case is now moot. Public Law No. 97-415 overruled the decision of the court of appeals by vesting the Commission with authority to dispense with advance hearings on license amendments determined to entail no significant hazards consideration. Moreover, the new legislation prescribes both the circumstances in which that authority may be used and the procedures to be employed in that connection. Because the issue decided by the court of appeals—the state of the law prior to the recent amendment to Section 189(a)—can no longer affect the rights of the parties, these cases are moot. See *DeFunis* v. *Odegaard*, 416 U.S. 312, 316 (1974). This is especially so because the

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[2]Because the House of Representatives rejected Section 23 as it appeared in the conference committee bill, a provision that has no bearing upon the issue in this case, while adopting the rest of the conference report, including Section 12 of the bill, see 128 Cong. Rec. H8809, H8817, H8826 (daily ed. Dec. 2, 1982), and because the bill finally passed by both Houses contained a different version of Section 23, the manager of the bill on behalf of the Senate took care to underscore that the Conference Report was intended to provide the authoritative legislative history of the balance of the legislation enacted. 128 Cong. Rec. S15314 (daily ed. Dec. 16, 1982) (remarks of Sen. Simpson).

concrete controversy that triggered filing of the petitions for review in the court of appeals had expired even before the court of appeals rendered its judgment; the case was adjudicated based on the court of appeals' determination that the controversy was "capable of repetition, yet evading review" (80-1640 Pet. App. 9a, quoting *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 515 (1911)). Plainly, the enactment of Pub. L. No. 97-415 eliminates all possibility that the legal controversy that spawned this case will be repeated.

Because this Court has previously determined that the decision of the court of appeals warranted further review, and because the effect of the enactment of legislation mooting this case is to eliminate the occasion for that review, this Court should follow its established practice in dealing with civil cases from courts in the federal system that have become moot while pending this Court's decision on the merits, by vacating the judgment of the court of appeals and remanding the case with directions to dismiss the petitions for review as moot. See, e.g., *Great Western Sugar Co.* v. *Nelson*, 442 U.S. 92, 93 (1979); *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39-41 (1950).

The private petitioners have authorized us to indicate that they join in this suggestion of mootness.

It is therefore respectfully submitted that the judgment of the court of appeals should be vacated, and the case remanded with instructions to dismiss the petitions for review as moot.

REX E. LEE
Solicitor General

JANAURY 1983

APPENDIX

H.R. 2330—Public Law 97-415

[96 Stat. 2067]

Ninety-seventh Congress of the United States of America

AT THE SECOND SESSION

Begun and held at the City of Washington on Monday, the twenty-fifth day of January, one thousand nine hundred and eight-two

An Act

To authorize appropriations to the Nuclear Regulatory Commission in accordance with section 261 of the Atomic Energy Act of 1954, as amended, and section 305 of the Energy Reorganization Act of 1974, as amended, and for other purposes.

Be it enacted by the Senate and House of Representative of the United States of America in Congress assembled,

* * * * *

OPERATING LICENSE AMENDMENT HEARINGS

SEC. 12. (a) Section 189 a. of the Atomic Energy Act of 1954 (42 U.S.C. 2239(a)) is amended—

(1) by inserting "(1)" after the subsection designation; and

(2) by adding at the end thereof the following new paragraph: "(2)(A) The Commission may issue and make immediately effective any amendment to an operating license, upon a determination by the Commission that such amendment involves no significant hazards consideration, notwithstanding the pendency before the Commission of a request for a hearing from any person. Such amendment may be issued and made immediately effective in advance of

the holding and completion of any required hearing. In determining under this section whether such amendment involves no significant hazards consideration, the Commission shall consult with the State in which the facility involved is located. In all other respects such amendment shall meet the requirements of this Act.

"(B) The Commission shall periodically (but not less frequently than once every thirty days) publish notice of any amendments issued, or proposed to be issued, as provided in subparagraph (A). Each such notice shall include all amendments issued, or proposed to be issued, since the date of publication of the last such periodic notice. Such notice shall, with respect to each amendment or proposed amendment (i) identify the facility involved; and (ii) provide a brief description of such amendment. Nothing in this subsection shall be construed to delay the effective date of any amendment.

"(C) The Commission shall, during the ninety-day period following the effective date of this paragraph, promulgate regulations establishing (i) standards for determining whether any amendment to an operating license involves no significant hazards consideration; (ii) criteria for providing or, in emergency situations, dispending with prior notice and reasonable opportunity for public comment on any such determination, which criteria shall take into account the exigency of the need for the amendment involved; and (iii) procedures for consultation on any such determination with the State in which the facility involved is located."

(b) The authority of the Nuclear Regulatory Commission, under the provisions of the amendment made by subsection (a), to issue and to make immediately effective any amendment to an operating license shall take effect upon the promulgation by the Commission of the regulations required in such provisions.